



## HABEAS CORPUS RESOURCE CENTER

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# Memorandum Regarding Law Firm Appointments in Capital State Habeas Corpus Proceedings

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### **I. The Urgent Need for Counsel in Capital State Habeas Corpus Proceedings**

Two recent legal developments have created a crisis in capital state habeas corpus proceedings: the revision of California procedure to provide in most capital cases for separate counsel for state direct appeal and habeas corpus proceedings, and the passage of the federal Antiterrorism and Effective Death Penalty Act ("AEDPA"), effective in 1996.

Since the institution of the state procedure providing for the appointment of separate counsel for direct appeal and habeas corpus proceedings in capital cases, many more counsel have agreed to take appointments for direct appeal than for habeas corpus proceedings. As a result, 156 of the over 633 inmates on Death Row in California have appellate counsel, but no habeas counsel. This fact, combined with the new one-year statute of limitations in habeas corpus proceedings in federal court, enacted as part of the AEDPA, imperils California death row inmates' right to federal review. The one-year federal statute of limitations runs from the time of completion of the direct appeal in state court. Thus, a capital defendant with appellate counsel but no habeas counsel runs the risk of losing his or her opportunity for federal review of his habeas claims, if his or her appeal is completed and the federal statute of limitations runs before state habeas counsel is appointed and can file a state habeas petition.

As a result of this confluence of circumstances, currently 63 California Death Row inmates are in danger of losing the opportunity for federal review of their habeas corpus claims. Moreover, counsel appointed to represent capital defendants in the state habeas corpus proceedings in these crisis cases will be limited to a three-year time period in which to prepare and file a presumptively timely state habeas corpus petition. It is difficult for the sole practitioners with limited resources who often take capital habeas corpus appointments to meet this relatively brief time frame, which only applies in the crisis cases.

### **II. The Unique Suitability of Law Firms to Meet this Short Term Need**

California Supreme Court Chief Justice Ronald M. George, along with bar leaders including California State Bar President John Van De Kamp and former Bar Association of San Francisco President Jon B. Streeter, have recognized that private law firms can provide invaluable assistance in solving this short-term crisis in capital state habeas corpus representation, and have called upon such law firms to meet this critical need. The limited number of crisis cases, the high quality of

representation provided by law firms, and the resources enabling such firms more readily to meet the three-year time frame for completion of state habeas petitions, combine to make law firms ideal advocates to represent Death Row clients in these crisis cases.

### **III. New Solutions for Past Concerns**

Law firms that represented capital inmates in the past voiced a number of concerns about that representation, including the view that firms were asked to accept an open-ended, long-term time commitment; firms were provided with insufficient and uncertain reimbursement for fees and expenses; and firms had access only to uneven assistance and training that was not tailored to the law firm structure. The California Supreme Court and the Habeas Corpus Resource Center (HCRC) have taken these concerns into account and directly addressed them by adopting new habeas corpus policies and designing a new program geared towards law firm representation of capital defendants in state court habeas corpus proceedings:

#### **A. Clear, Predictable Time Commitment**

The cases to which the law firms will be appointed are all cases with a presumptively timely filing date of the state habeas corpus petition within three years of the firm's appointment to the case. Thus, the major portion of the firm's commitment will be completed within three years of appointment, followed by an informal briefing process to be completed after the filing of the petition. It is left up to the firm to decide whether or not to continue representing the client in federal habeas corpus proceedings.

#### **B. Reliable, Predetermined Funding of Fees and Expenses**

The California Supreme Court now offers a flat fee method of payment, which allows firms, with the assistance of the HCRC, to negotiate their fee for the case up-front and avoid the time-consuming preparation of requests for fees and expenses. Flat fees vary depending on case complexity and length of the record, but can be up to \$112,000 and sometimes more, plus \$130 for each 50 pages of transcript. In addition, the Court provides \$25,000 towards expenses on each case. The Court recently streamlined and simplified the format and content of flat fee requests, clearly setting forth the factors considered by the Court in setting a fixed fee. These factors include the necessity of using some fees to cover investigative and incidental expenses. Since firms often view their work on the case as a largely pro bono commitment, and use at least some of their fees to cover expenses, this may result in potentially higher flat fees. As a result of the funding available, firms are less likely to need to use their own resources to cover expenses.

#### **C. Training and Case Assistance Tailored to Law Firm Structure**

The HCRC and the California Appellate Project (CAP) have worked together to develop a training and assistance program designed to meet the needs of law firms. The services provided to firms who take capital state habeas appointments include pre-appointment collection of client social history documents by CAP staff; a "Habeas College" tailored to the firm and case, conducted by HCRC staff; ongoing mentoring and assistance, with case-planning and follow-up at regular intervals with expert habeas attorneys; and assistance in locating potential lay and expert witnesses.

The Habeas College is designed to provide the firm with the background knowledge and organizational tools necessary to investigate, prepare, and file a state habeas corpus petition. The college consists of a series of one- to two-day programs conducted at six-month intervals during the three-year period of petition preparation. Topics covered at the college include an overview of capital habeas procedure; common habeas legal claims and their elements; a primer on forensic and mental health issues that often arise in capital cases; case management tips, including case timelines, information management, and investigation; brainstorming of critical facts in the case; identifying and using experts; and strategic considerations in presenting claims. Before the college, HCRC attorneys assist counsel in determining appropriate staffing for the case and optimal use of technology resources already available to the firm.

#### **IV. Benefits of a Capital Habeas Appointment**

Law firm participants have recognized benefits to their firms flowing from their acceptance of a capital state habeas corpus appointment. Firms have stated that such cases provide their associates with excellent opportunities for professional development, and offer their attorneys intellectually challenging and personally rewarding work. Most importantly, firms that take capital state habeas corpus appointments provide valuable community service, and meet a critical need for competent representation for death-sentenced prisoners in California.